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No. 81- ——

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES M. NAMEN, et al. and STATE OF MONTANA,

Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al. and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Question I.

A. Whether the "strong presumption" that a state is constitutionally vested with title to a navigable lake within its borders is overcome merely because a portion of that lake lies within the exterior boundaries of a treaty-created Indian reservation, when such treaty is substantively indistinguishable from the Fort Laramie Treaty of 1868 construed in *Montana v. United States*, 450 U. S. 544 (1981), and when there exists no unusual public exigency to depart from the Equal Footing Doctrine.

B. Whether alienation of nearly 100 percent of former Indian lands riparian to such navigable lake confirms title to the bed of the lake in the state.

C. Whether treaty, statutory, and judicial imposition of the navigational servitude upon that portion of the navigable lake that lies within the borders of the Indian reservation strengthens the constitutional presumption that title to the bed of the lake vests in the state pursuant to the Equal Footing Doctrine.

Question II.

Whether *Wilson v. Omaha Indian Tribe*, 442 U. S. 653 (1979), requires ownership of riparian land within an Indian reservation to be measured by reference to state law.

Question III.

Whether, in light of *Montana v. United States, supra*, federally created, and non-Indian owned riparian rights of access to a navigable lake within the exterior boundaries

of an Indian reservation are subject to tribal control, absent congressional authorization or proof that exercise of such riparian rights threatens or has some direct effect on the Tribe.

Question IV.

Whether a tribal shoreline protection ordinance approved and supported by the federal government, which comprehensively regulates non-tribal fee owners' federally granted dockage, wharfage, and access rights to a navigable lake, constitutes a denial of equal protection or deprivation of due process of law contrary to the Fifth Amendment to the United States Constitution.

PARTIES TO THIS LITIGATION

Pursuant to Rule 21.1(b), Rules of the Supreme Court of the United States, Petitioners name the parties to the litigation: James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen, and The State of Montana, Petitioners, v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and Thomas E. Pablo, Chairman of the Tribal Council, on his own behalf and as a representative of The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the United States of America, Respondents. An additional party to this litigation in the court below was the City of Polson, Montana.

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Petitioners, James M. Namen, et al. and the State of Montana, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1982, and in which a petition for rehearing and suggestion for rehearing *en banc* were denied and rejected on March 10, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals in *Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, et al. v. James M. Namen, et al., City of Polson, Montana,* and *State of Montana,* 665 F. 2d 951 (9th Cir., 1982), appears as Appendix A. The lower court's order denying Petitioners' application for rehearing and rejecting their suggestion for rehearing *en banc* is included in Appendix A. The unpublished opinion of the United States District Court for the District of Montana, *Confederated Salish & Kootenai Tribes v. James M. Namen, et al.,* appears as Appendix B. Because the Court of Appeals adopted its opinion in *Montana Power Co. v. Rochester,* 127 F. 2d 189 (9th Cir., 1942), on the lake ownership issue, that opinion appears as Appendix C.

The initial phase of the present controversy was commenced in 1973 and produced two opinions. *Confederated Salish & Kootenai Tribes v. Namen,* 380 F. Supp. 452 (D. Mont., 1974), aff'd 534 F. 2d 1376 (9th Cir.), cert. den. 429 U. S. 929 (1976) (*"Namen I"*). Copies of those opinions appear as Appendices D and E, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 11, 1982. A timely peti-

tion for rehearing and suggestion for rehearing *en banc* was denied March 10, 1982, and a timely application for an extension of time within which to file this Petition was granted, extending time to July 1, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

TREATIES AND STATUTES INVOLVED

The following treaties and statutes are reproduced as appendices:

1. Treaty of Hellgate, 1855, 12 Stat. 975 (Appendix F);

2. Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657 (Appendix G);

3. Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (Appendix H);

4. The Flathead Allotment Act of April 23, 1904, 33 Stat. 302 (Appendix I);

5. House Report No. 1678, 58th Cong., 2nd Ses. (Appendix J);

6. Senate Report No. 1930, 58th Cong., 2nd Ses., April 7, 1904 (Appendix K);

7. Senate Report No. 117, 61st Cong., 2nd Ses., January 26, 1910 (Appendix L);

8. Regulations for the Sale of the Villa-Site Lots around Flathead Lake in the Former Flathead Indian Reservation, Montana, March 20, 1915 (Appendix M);

9. Ordinance 64-A, Shoreline Protection Ordinance (Appendix N);

10. Stipulation and Order dated November 1, 1974 (Appendix O);

11. Patent issued to Antoine Morais (Appendix P).

Other statutes and constitutional provisions involved are:

1. The Enabling Act of Montana, February 22, 1889, 25 Stat. 676, which in pertinent part provides:

> "An Act * * * to enable the people of * * * Montana * * * to be admitted into the Union on an equal footing with the original states * * *."
>
> "Section 4 * * * Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, * * *."

2. The Fifth Amendment to the United States Constitution, which in pertinent part provides: "No person shall be * * * deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

This case originated in 1973, when the Confederated Salish & Kootenai Tribes of the Flathead Reservation ("the Tribes")[1] sought to force James M. Namen and

[1] "The Flathead Indian Reservation * * * consists of approximately 1,245,000 acres, of which approximately 628,642 acres are owned in fee, 614,311 in trust, either for the Plaintiff tribes (564,320 acres) or individual Indians (49,991 acres), and 1,017 acres by the United States. The reservation is part of four Montana counties—Lake, Saunders, Missoula, and Flathead. * * * Tribal members comprise 19 percent of the total reservation population." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1313 (D. Mont., 1975), aff'd 425 U. S. 463 (1976).

others ("Namen") to remove docks, wharves, and other structures which encroached upon the south half of Flathead Lake.[2] The Tribes contended that Article 2 of the Hellgate Treaty, 1855, 12 Stat. 975 (App. F at 208) vested them with absolute beneficial title to the south half of Flathead Lake and that any encroachment upon the bed of that lake, without tribal consent, was a trespass upon tribal property. In *Namen I*,[3] the district court held, following a prior Ninth Circuit decision, *Montana Power Co. v. Rochester*, 127 F. 2d 189 (9th Cir., 1942) (App. C), that while the Tribes owned beneficial title to the south half of Flathead Lake; neverthless, fee owners of land riparian to the lake possessed federal common law riparian rights of access to the lake which included the right to dock and wharf out to navigable water.[4] In *Namen I*, the district court left for later determination the question of whether

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[2]Flathead Lake is the largest body of fresh water west of the Great Lakes. It is 26 miles long and up to five miles wide. Its south half contains 45 miles of shoreline. Mem. Op. at 40, 59, App. B at 86, 110. Approximately 1,400 docks and wharves extend into the south half of the lake. In the past, these docks and wharves have been comprehensively regulated by Lake County under the Shoreline Protection Act, 75-2-201, *et seq.*, M. C. A., 1981, and the Corps of Engineers. Mem. Op. at 39, 65, App. B at 84, 118.

[3]*Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974), aff'd 534 F. 2d 1376 (9th Cir.), cert. den. 429 U. S. 929 (1976). Apps. D and E, respectively. This was the first instance in which the Tribes had judicially alleged an exclusive right to the south half of the lake which would exclude riparian rights of dockage and wharfage. App. O at 286.

[4]The level of Flathead Lake is regulated pursuant to Federal Power Commission License No. 5, presently owned by The Montana Power Company. This license requires The Montana Power Company to maintain the level of the lake between 2893.2 and 2883.2 feet. The lake is maintained at high-water mark only 10 weeks of the year. For the remaining period of time, it is maintained below that level. At low water, littoral to Namens' property, a navigable depth (four feet) is reached at 450 feet from high-water mark. Mem. Op. at 41, n. 58, App. B at 87.

any of the Namen structures[5] represented an abuse of these riparian rights. *Namen I*, 380 F. Supp. at 467 (App. D at 201). On appeal, the lower court, in a *per curiam* opinion, affirmed and adopted the district court's opinion. 534 F. 2d 1376. Certiorari was petitioned for by the Tribes but denied. 429 U. S. 929 (1976).

In 1977, the Tribes passed Ordinance 64-A (revised), their Shoreline Protection Ordinance. App. N at 272. The ordinance was passed for the purpose of regulating existing and future riparian structures maintained by nonmembers in the south half of Flathead Lake. The Tribes amended their complaint to allege, *inter alia*, that the Namen structures violated the ordinance and to require the Namens to maintain their structures in compliance with tribal law. Additionally, the Tribes alleged that the existing structures constituted an abuse of common law riparian rights because they were more extensive than needed, were of a type not permitted, affected water quality, and interfered with navigation and Indian fishing rights on Flathead Lake. The United States intervened on behalf of the Tribes, and the City of Polson and the State of Montana intervened on behalf of Namen.[6]

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[5]Later, similar structures erected by the City of Polson, Montana, were also challenged in the Tribes' amended complaint.

[6]Three actions were filed in and consolidated by the district court: Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al., Plaintiffs and Counterclaim Defendants, and United States, Intervenor-Plaintiff, v. James M. Namen, et al., Defendants, and City of Polson, Montana, Intervenor-Defendant and Counterclaim Plaintiff, being Cause No. 2343; City of Polson, Montana, Plaintiff, and State of Montana, Intervenor-Plaintiff, v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Defendant, being Cause No. CV-75-143-M; and United States, Plaintiff, v. City of Polson and The State of Montana, Defendants, being Cause No. CV-77-70-M. These actions were later consolidated on appeal to the lower court as Cause Nos. 80-3189, 80-3190, 80-3196, 80-3216, and 80-3274.

The district court, in a memorandum opinion (App. B), dismissed those counts of the complaint alleging abuse of federal common law riparian rights[7] and further ruled the Tribes had no authority to regulate the riparian rights of non-Indians who owned land riparian to the south half of Flathead Lake (the "regulatory issue"). However, following its prior ruling in *Namen I, supra,* the court held the south half of the lake was owned by the Tribes (the "ownership issue").

The United States sought a declaration that the Flathead Indian Reservation was not *pro tanto* disestablished because it was opened to non-Indian settlement pursuant to the Act of April 23, 1904, 33 Stat. 302, App. I at 236 (the "termination issue"). The district court held no such disestablishment had been effected.

The Tribes and the United States appealed from the district court's ruling on the regulatory issue; whereas, Namens and the State appealed from the district court's ruling on the ownership and termination issues.

The lower court affirmed the district court on the termination and ownership issues but reversed on the regulatory issue, holding that the Tribes' Shoreline Protection Ordinance was a valid exercise of tribal authority because no "significant federal interests would be impaired." 665 F. 2d at 963. Also, it sought only to regulate tribally owned property—the south half of the lake, and the conduct sought to be regulated "has the potential for significantly affecting the economy, welfare, and health of the Tribes" because unregulated conduct would affect "one of the most important tribal resources." *Confederated Salish & Kootenai Tribes v. Namen,* 665 F. 2d at 964, App. A at 30.

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[7]The Tribes did not appeal that portion of the district court's ruling dismissing the "abuse" counts.

Although Namen also asserted that his riparian title extended to low-water mark pursuant to *Wilson v. Omaha Indian Tribe*, 442 U. S. 653, 61 L. Ed. 2d 153 (1979), the lower court did not specifically rule on this question.[8] From the decision on the regulatory and ownership issues, Namen and the State of Montana petition this Court for a Writ of Certiorari to issue to the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. Reasons for Granting the Writ.

A. The Lower Court's Decision Stands in Irreconcilable Conflict with this Court's Recent Explication of the Equal Footing Doctrine in Montana v. United States, 450 U. S. 544 (1981).

Despite this Court's most recent reinforcement of the Equal Footing Doctrine as the cornerstone supporting the States' claims to the beds of navigable waters within their borders, the lower court has held that the Treaty of Hellgate, 1855, 12 Stat. 975 (App. F), conveyed the south half of Flathead Lake, a navigable body of water,[9] to the Tribes. This result was produced even though (1) the treaty which created the Flathead Indian Reservation is substantively indistinguishable from the Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (App. H),

[8]The trial court did address this issue but held, following the circuit court's holding in *United States v. Montana*, 604 F. 2d 1162 (9th Cir., 1979), and in *Rochester, supra*, that the Tribes owned title to high-water mark. Mem. Op. at 13-14, App. B at 50-52.

[9]See note 2, *supra*. By 1845, the Equal Footing Doctrine had been firmly established (*Pollard's Lessee v. Hagan*, 44 U. S. (3 How.) 212 (1845)), and Congress was cognizant of that doctrine in 1859 when it ratified the Hellgate Treaty. *Montana v. United States*, 450 U. S. 544, 502, n. 2 (1981); *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 588 (1977).

construed by this Court in *Montana v. United States*, 450 U.S. 544 (1981); (2) no unusual public exigency existed in 1855 which would support departure from the Equal Footing Doctrine; (3) there were no facts to rebut the "strong presumption" in favor of state ownership of such waters; (4) nearly all lands riparian to the lake within the reservation have been alienated in fee to non-Indians; and (5) a navigational servitude had been imposed upon the lake.

An analysis of the lower court's opinion discloses that it had three purported reasons for refusing to follow *Montana v. United States*. First, the lower court said that its earlier decision in *Montana Power Co. v. Rochester*, 127 F. 2d 189 (9th Cir., 1942), having stood unaltered for 50 years, is "strongly supported by *stare decisis*" to the point where it has taken on the characteristics of a rule of "property law." 665 F. 2d at 960. Second, the court said the Hellgate Treaty differed significantly from the 1968 Fort Laramie Treaty (15 Stat. 649, App. H) in that the Hellgate Treaty "referred to a lake in defining the boundaries of the reservation." 665 F. 2d at 961-962, App. A at 26. Finally, the court perceived a "public exigency" existed in 1855, which, apparently, in the opinion of the lower court, did not exist in 1868, in that one of the tribes located on the Flathead Indian Reservation "depended heavily on fishing" and the Office of Indian Affairs was urgently pressing the Senate to ratify the Hellgate Treaty so as to open large areas of the Washington Territory to settlement. 665 F. 2d at 962, App. A at 27-28. It is patent that in reaching the result it did, the lower court reversed the priority of those significant factors which bear upon the ownership issue.

In *Montana v. United States, supra*, this Court stated that in approaching the question of whether navigable

waters within an Indian reservation have been conveyed out of the trust imposed by the Constitution (*e.g., Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373, 374 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)), one must:

> " • • • begin with a strong presumption against conveyance by the United States • • • and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain • • • ' or was rendered 'in clear and special words' • • • or 'unless the claim conferred in terms embraces the land under the waters of the stream,'." 450 U. S. at 501-502.

To overcome this presumption, treaty intention must be "'plain,'" or the treaty must utilize "'clear and special'" words or terms which embrace the land under the lake. *Ibid.*, 450 U.S. at 552. The lower court found such an intent in treaty language which is virtually identical to that approved by Congress when it ratified the Second Treaty of Fort Laramie 1868 (App. H),[10] although the

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[10]Article II of the Hellgate Treaty reserves for the "use and occupation" of the Tribes the following tract of land:

> "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west of Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning."

Article 2 of the 1868 Fort Laramie Treaty reserved for the "absolute and undisturbed use and occupation" of the Crow Tribe the following tract:

> "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana

(Continued on following page)

Fort Laramie Treaty did not contain a provision like Article VI[11] of the Hellgate Treaty. Also, the Tribes did not have a provision requiring their consent to future cessions.[12] Thus, the lower court consciously rejected both the presumption against conveyance and the requirement for specially tailored language. 665 F. 2d at 961, n. 7, 962.

The Second Treaty of Fort Laramie, originally describing the boundaries of the reservation, and Congress, in subsequently diminishing it, made specific reference to navigable waters, the Yellowstone and the Big Horn Rivers. In fact, in 1958, in describing the take area for Yellowtail Dam, Congress made specific reference to the "middle of the thread of the Big Horn River." Act of July 15, 1958, P. L. 85-523, 72 Stat. 351. See also Act of April 11, 1882, Chapter 74, 22 Stat. 42; Act of March 3, 1891, Chapter 543, 26 Stat. 981, 1039-40. Such references, however, since they did not specifically embrace the beds of the rivers or the land underneath the waters, were insufficient to overcome the presumption created by the Equal Footing Doctrine.[13]

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Territory; thence north along said 197th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning * * *."

[11]See note 19, *infra*. Article VI of the Hellgate Treaty was construed by Congress as the predicate for ultimately making available for settlement all but 100,000 acres of reservation land. Senate Report No. 1930, 58th Cong., 2nd Ses., April 7, 1904, App. K at 257; see also House Report No. 1678, 58th Cong., 2nd Ses., App. J at 246.

[12]See, however, Article 11 of the Fort Laramie Treaty. App. H at 233.

[13]Indeed, in dissent, Justice Blackmun made specific reference to this "middle of the thread" description to contend that ownership of the river lay in the Crow Tribe. 450 U. S. at 577, and n. 13.

This Court held that the Crow treaties, even though making reference to the thread of the river, and even though the Big Horn River flowed through the heart of the reservation, failed to overcome:

> "the established presumption that the beds of navigable waters remain in trust for future states and pass to the new states when they assume sovereignty. * * * Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." 450 U. S. 553, 554.

The mere fact that the bed of the south half of Flathead Lake "lies within the boundaries described in the (Hellgate) treaty does not make" the lakebed "part of the conveyed land, especially when there is no express reference to the (lakebed) that might overcome the presumption against its conveyance." 450 U. S. at 554; parenthetical words substituted.

Moreover, the "public exigency" which the lower court perceived to exist in 1855 was not unlike that which existed in 1868, for in 1868, public and government pressures were forcing the United States to treat with the Crow. J. Blackmun dissenting, 450 U. S. at 571-573. However, the fundamental purpose of both the 1855 and 1868 treaties was the same: To convert the tribes from a "nomadic, hunting tribe to a settled, agricultural people." 450 U. S. at 571; see also Articles IV and V, Hellgate Treaty.[14] App. F at 210-211.

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[14] In the Official Proceedings of the Council with the Flathead, Kootenai, and Upper Pend d'Oreille Indians Commencing July 7 and ending July 16, 1955 (National Archives Record Group No. 75, Treaty File No. 295, Item No. 1), at pp. 5-7, 14, 25-27, 29-30, 35-40, "Treaty Minutes," are numerous statements by Governor Stevens and Indian representatives which relate to this essential purpose.

The lower court also held that one of the Tribes heavily depended upon fishing, and, therefore, this "public exigency" warranted departure from the Equal Footing Doctrine. However, the lower court totally failed to recognize that Article III of the Hellgate Treaty restricted "exclusive" fishing rights to the streams which border or run through the reservation. App. F at 209.[15] Even to the "unlettered" Indian, a lake "'180 square miles large'" could hardly be construed as a "stream."[16] Also, it was only one tribe, the Lower Kootenai, which relied upon fishing (665 F. 2d at 962, App. A at 28); however, the other—and more populous tribes—the Flathead, Upper Kootenai, and Pend d'Oreille, pursued the buffalo culture, just as did the Crow.[17] *Confederated Salish & Kootenai Tribes v. United States*, 8 Ind. Cl. 40, 43, 46, 47, 51, 52.[18]

Finally, there was absolutely no evidence that either at the time of the treaty or subsequently the Tribes were solely or heavily dependent upon fishing for their economy or their diet and certainly no evidence that any one of the Tribes relied upon any fishery provided by Flat-

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[15]The Tribes' vocabulary included words for "stream," "river," and "lake." Giorda, Reverend J. S. J., *A Dictionary of the Kalispell or Flathead Indian Language*, compiled by the Society of Jesus, Part III, St. Ignatius, Mont., 1877-1879, pp. 217, 318 & 374.

[16]Cf. *Namen I* at 380 F. Supp. at 458; App. D at 182. This Court has held that liberal rules of construction are not a license to rewrite Indian treaty language. *DeCoteau v. District County Court*, 420 U. S. 425, 447 (1975).

[17]However, the Crow did not disdain fish. This Court merely held fishing "was not important to their diet or way of life." 450 U. S. at 556. See also J. Blackmun's dissent, 450 U. S. at 573, n. 7.

[18]One of the purposes for the Treaty of the Upper Missouri, 1855, 11 Stat. 657, App. G, was to guarantee to the tribes common access to their traditional *hunting grounds*. Articles 3, 4, 5, and 6.

head Lake. For example, it was the Pend d'Oreille Tribe (following the buffalo culture) which looked upon the Flathead Lake region as their territory, not the Kootenai. *Confederated Tribes, etc. v. United States, supra,* 8 Ind. Cl. at 57-58.

The lower court was, therefore, reviewing a factual situation similar to that studied by the lower court in *Skokomish Indian Tribe v. France,* 320 F. 2d 205 (9th Cir., 1963). *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918) (cited by the *Rochester* court), is clearly inapposite, for in that case, the "fishery" surrounding the Annette Islands "would afford a primary means of subsistence and a promising opportunity for industrial and commercial development" (*Id.,* 248 U.S. at 88-89); whereas, the Flathead Reservation was to provide the Tribes with an agrarian economy. N. 16, *supra.*

Furthermore, as observed by this Court in *Massachusetts v. New York, supra,* 271 U.S. at 88:

> "It would be difficult to suggest any purpose which the high contracting parties could have had in mind which would have been furthered by a grant to (the Tribes) of a fee in the bed of the lake. The right of (the Tribes) and her grantees to use the waters of the lake was amply secured by a clause of the treaty which provided that they would enjoy 'the same and equal rights respecting the navigation and fishery' on the lake as are enjoyed by all other citizens." (Parenthetical words inserted.) See, e.g., Article 8, Treaty of the Upper Missouri and Article III of the Treaty of Hellgate, "the right of taking fish at all usual and accustomed places, in common with citizens of the territory * * *." App. F at 209.

It is also obvious that the rule of "property law" relied upon by the lower court breaks precedent with an almost unbroken line of federal decisions which hold that

navigable waters are owned by the respective states. *E.g. Martin v. Waddell*, 41 U. S. (16 Pet.) 366 (1842); *Pollard's Lessee v. Hagan*, 44 U. S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U. S. 1 (1894); *United States v. Holt State Bank*, 270 U. S. 49 (1926); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977); and most recently, *Montana v. United States*, 450 U. S. 544 (1981).[19] This means that riparian ownership is governed by state law, not federal law. *Shively v. Bowlby, supra*; *Oregon v. Corvallis Sand & Gravel Co., supra*.[20]

Flathead Lake is drawn down 10 feet below ordinary high-water mark for all but 10 weeks out of the year. Almost 100 percent of land riparian to the south half of the lake is owned in fee by non-Indians. Thus, the "rule of property law" adopted by the lower court would create

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[19] *Choctaw Nation v. Oklahoma*, 397 U. S. 620 (1970), discussed by this Court in *Montana v. United States, supra*, 450 U. S. at 555, n. 5, held that certain Indian tribes, because of the unique treaty language involved, owned the bed of the Arkansas River; however, the circumstances which led this Court to so hold are clearly non-existent in this case, for instead of guarantees that the reservation would never become part of any state, the treaty itself contemplated the reservation would be embraced within a future state. Article 6 of the Omaha Treaty, March 16, 1854 (10 Stat. 1033), was incorporated by reference in Article VI of the Hellgate Treaty (App.F at 212) and specifically mentioned that restrictions on alienation "shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." Additionally, the Tribes were not granted the fee to their reservation lands as was the situation in *Choctaw, supra*.

[20] In Montana, the rule of property law which has existed since 1895 (Section 1291, Mont. Civ. C., 1895), and which applies not only to every other navigable body of water in the state, including a portion of the Big Horn River which bisects the Crow Indian Reservation, but also which applies to the north half of Flathead Lake, is that the riparian owner owns to low-water mark. 70-16-201, M. C. A., 1981; *Fawcette v. Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *cf. Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Gibson v. Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895).

the anomalous situation where the north half of the lake is governed by traditional Montana property law, and in the south half of the lake, a strip of land which would ordinarily be owned by the riparian owner, would be owned and controlled by the Tribes. This Court has plainly indicated that it would not approve such a result. *Massachusetts v. New York*, 271 U.S. 65, 91-92 (1926).

Moreover, the lower court clearly misconceived the thrust of the doctrine of *stare decisis*. While the district court felt compelled to follow the lower court's *Rochester* decision (See, *e. g.*, Mem. Op. at 12, App. B at 52; *United States v. Pollmann*, 364 F. Supp. 995 (D. Mont., 1973).),[11] however, the lower court was not itself *bound* to follow *Rochester (Hertz v. Woodman*, 218 U.S. 205, 212 (1910)), particularly when adherence to that decision "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 241 (1970). The lower court's decision collides head-on with an intrinsically "sounder" and "verified" policy—the Equal Footing Doctrine, which has stood the test for almost 140 years.

Most importantly in this case, just as in *Oregon v. Corvallis Sand & Gravel Co., supra*, "we are not dealing with substantive property law as such, but rather, with an issue substantially related to the constitutional sovereignty of the states." 429 U.S. at 381; *cf. Montana v.*

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[11]Other cases citing *Rochester* as authoritative on the ownership issue such as *Montana Power v. F. P. C.*, 298 F. 2d 338 (D. C. Cir., 1962); *Montana Power Co. v. F. P. C.*, 445 F. 2d 739 (D. C. Cir., 1970), cert. den. 400 U. S. 1013 (1971), involve one of the parties to the *Rochester* decision, The Montana Power Company, and, therefore, the power company was estopped to challenge the decision for which it was responsible.

United States, supra. Thus, *stare decisis* plays "a less important role" than in cases involving merely property law. Montana was never a party to *Rochester* and, prior to this litigation, has not been given an opportunity to challenge *Rochester* and illustrate its fundamental weaknesses and inherent error. Just as *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), was a departure from settled property law principles; so also is *Rochester* such a departure. *E.g., Corvallis, supra*, 429 U.S. at 374, 381; *Shively v. Bowlby, supra. Cf. City of Berkeley v. Superior Court of Alameda*, 162 Cal. Rptr. 327, 606 P. 2d 362 (1980), cert. den. 449 U.S. 840 (1980).

Moreover, *Rochester* did not analyze the Treaty of Hellgate in light of the "strong presumption" against alienation created by the Equal Footing Doctrine. *Montana v. United States, supra; United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). In fact, the *Rochester* court was neither cited to nor did it cite the *Holt State Bank* case. *Rochester* actually employed a presumption which favored the Tribes, not the State. 127 F. 2d at 191, 192. Rather than inquiring whether the treaty language was "plain" or utilized "clear and special" words or terms which embraced the land under the lake, the Court merely said that the "treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region" (*Ibid.* at 191.) but without setting forth the specific language that actually said that.

The lower court also wholly ignored the bearing the navigational servitude and the opening of the reservation had on the ownership issue. *Cf. Montana v. United States*, 450 U.S. at 555. Only three short months after the Hell-

gate Treaty was negotiated, Governor Stevens met with, *inter alia*, the Blackfeet and the Flathead, to negotiate the Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657, App. G. Among others, Victor, Alexander, Michelle and Little Michelle, chiefs of those tribes who signed the Hellgate Treaty, also executed the Treaty of the Upper Missouri. Although the treaty was negotiated after the Hellgate Treaty, it was ratified by Congress before it ratified the Hellgate Treaty.[22] The Treaty of the Upper Missouri had a significant impact upon the "exclusivity" promised in the Hellgate Treaty, for it provided that citizens of the United States could "pass unmolested through the countries" respectively occupied by the various tribes signatory to the treaty and further "that the navigation of all lakes and streams shall be forever free to citizens of the United States." Articles 7 and 8, App. G at 220-221.[23]

In 1904, Congress opened the reservation to non-Indians, Act of April 23, 1904, 33 Stat. 302 (App. I). As a result of that opening, non-tribal members now far outnumber tribal members.[24] Nearly 100 percent of all land riparian to the lake is owned by non-Indians, among whom are the State of Montana and James M. Namen.

Congress specifically encouraged non-Indian ownership of riparian lands when it passed the Act of April 12, 1910, 36 Stat. 296, "the Villasites Act," which provided that lands bordering on the south half of Flathead Lake

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[22]The Hellgate Treaty was ratified March 8, 1859; whereas, the Treaty of the Upper Missouri was ratified April 15, 1856.

[23]*Namen I*, of course, had firmly established Petitioners' rights to navigate the lake. See also Act of March 3, 1811, 2 Stat. 606, 33 U. S. C. § 10; Act of May 18, 1796, 1 Stat. 468, 43 U. S. C. § 931.

[24]See note 1, *supra*.

should be subdivided into lots and sold at public auction. Senate Report No. 117, 61st Cong., 2nd Ses., January 26, 1910 (App. L).

Surely the fact (1) that the Tribes have alienated nearly 100 percent of all riparian land, including several large islands within the south half of the lake; (2) that the agency charged with the responsibility of selling off riparian land "touted" those lands as lying within a "former" Indian reservation; and (3) that "(t)he lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders * * * (and) * * * (t)he shores are well adapted for boat landings and the erection of wharves," dispels any notion that the lake had been reserved for the Tribes. App. M at 268.

A similar factual situation was studied by this Court in *Puyallup Tribe, Inc. v. Washington State Game Dept.*, 433 U.S. 165 (1977) (*"Puyallup III"*). In *Puyallup III*, this Court construed the treaty with the Nisqualli (December 26, 1854, 10 Stat. 1132) against the backdrop of subsequent legislation and events. Article II of the treaty established a reservation for the tribe's "exclusive use" and provided that no "white man (was) to be permitted to reside upon the same without permission of the tribe and the superintendent or agent." 433 U.S. at 174. By subsequent legislation, similar to the Flathead Allotment Act of 1904, all lands were allotted, and the allottees were permitted to alienate their lands. 433 U.S. at 174. At the time *Puyallup III* was decided, the Indians had alienated all but 22 acres of their reservation, none of which was riparian to the Puyallup River, a navigable stream which bisected their reservation. The tribe argued that the treaty reserved a right to "fish free of state inter-

ference." However, the Supreme Court held that such "an interpretation clashes with the subsequent history of the reservation and the facts of this case." 433 U. S. at 173. In footnote 12, the Court disparaged the tribe's argument that it owned the bed of the river:

> "Counsel for petitioner (the tribe) intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg. 10. This contention is at odds with the otherwise uncontradicted findings below." (*i.e.*, that all but 22 acres had been alienated.)

Even for the dissent in *Montana v. United States*, this would have been a significant factor bearing upon the ownership issue. 450 U. S. at 581, n. 18.

Obviously, if this Court's recent holding in *Montana v. United States* can be so easily sidestepped,[25] as was done by the lower court in this case, it would virtually eviscerate the Equal Footing Doctrine in most of our Western states.[26] For these reasons, this Court should review the lower court's decision on the "ownership issue."

B. The Circuit Court's Decision Conflicts with this Court's Recent Holding in Wilson v. Omaha Indian Tribe, 442 U. S. 653 (1979).

Throughout the course of this litigation, Namen has consistently asserted that regardless of who owns the south half of Flathead Lake, he owns to low-water mark under state law applied as a federal rule. The lower court

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[25]The lower court was unable to provide any substantive basis why *Montana v. United States* is not controlling. At best, the lower court's decision represents a very superficial effort to reduce this Court's latest elaboration of the Equal Footing Doctrine to an *ad hoc* decision.

[26]Governor Stevens negotiated numerous Indian treaties with other tribes containing virtually the same "boilerplate"

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did not specifically address this issue but, following *Rochester, supra,* held the Tribes' ownership extended to the bed of the south half of Flathead Lake. 665 F. 2d at 962, App. A at 28.

In *Wilson v. Omaha Indian Tribe, supra,* this Court held that questions of riparian ownership are governed by the existing state rule in two different contexts: First, when the subject land was granted away by patents (442 U. S. at 671); and, secondly, when the subject land remained within the original boundaries of the reservation (442 U. S. at 678-679).

This case most closely approximates the first situation exemplified by *Oklahoma v. Texas,* 258 U. S. 574 (1922), and its progeny[27] for here, the United States is-

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language as is contained in the Treaty of Hellgate. Many other treaties make reference to navigable rivers within state boundaries. See, e. g., Treaty with the Quinaielt, July 1, 1855, II Kapp. 719; Treaty with the Nez Perces, June 11, 1855, II Kapp. 702; Treaty with the Yakima, June 9, 1855, II Kapp. 698; Treaty with the Walla Walla, June 9, 1855, II Kapp. 694; Treaty with the Makah, January 31, 1855, II Kapp. 682; Treaty with the S'Klallam, January 26, 1855, II Kapp. 674; Treaty with the Dwanicn, January 22, 1855, II Kapp. 669; Treaty with the Nisqualli, December 26, 1854, II Kapp. 661; Treaty with the Tribes of Middle Oregon, June 25, 1855, II Kapp. 714; Treaty with the Umpaqua, November 29, 1854, II Kapp. 657; Treaty with the Yankton Sioux, April 19, 1858, II Kapp. 776. Permitting the lower court's decision to stand will merely perpetuate case-by-case litigation.

[27] *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U. S. 77, 88-89 (1922); *United States v. Champlin Refining Co.,* 156 F. 2d 769, 773 (10th Cir., 1946), aff'd 331 U. S. 788-789 (1947); *United States v. Oklahoma Gas & Electric Co.,* 318 U. S. 206, 209-210 (1942); compare *Whitaker v. McBride,* 197 U. S. 510 (1904). The rule articulated in the cited cases has been consistently applied in similar controversies—some involving former Indian lands. See, e. g., *Hardin v. Shedd,* 190 U. S. 508, 509 (1902); *Shively v. Bowlby,* 152 U. S. 1, 45 (1894); *Hardin v. Jordan,* 140 U. S. 371 (1891); *Packer v. Bird,* 137 U. S. 661 (1891); *Choctaw & Chickasaw Nations v. Board of County Commissioners,* 361 F. 2d 932, 933 (10th Cir. 1966);

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sued patents "granting former reservation lands." 442 U. S. at 671, n. 18. The lands held by Namen and the State of Montana are similar "to the several hundred acres of land within the Barrett Survey" which are held in fee and "concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals." 442 U. S. at 674.

But regardless of whether or not the first or second *Wilson* rule would be applied, the federal courts would still fashion a federal rule based upon state law for the reason there is no need for "a uniform national rule" to determine riparian ownership, and it is an area in which the state has a substantial interest "in having their own law resolve controversies such as these." 442 U. S. at 674.

Under Montana law, the owner of land riparian to navigable waters owns to low-water mark "except where the grant * * * indicates a different intent." 70-16-201, M.C.A., *supra*, n. 20; see also *Montana Power Co. v. Rochester, supra*, 127 F. 2d at 191. App. C at 163. The grant to Morais was absolute on its face and was subject to no material reservations or restrictions. App. P. Here, adoption of state law as the federal rule would make eminent good sense in view of the fact that the lake is

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Choctaw & Chickasaw Nations v. Seay, 235 F. 2d 30, 35 (10th Cir., 1956); *Herron v. Choctaw & Chickasaw Nations*, 228 F. 2d 830, 832 (10th Cir., 1956); *United States v. Elliott*, 131 F. 2d 720, 723 (10th Cir., 1942); *Shore v. Shell Petroleum Corp.*, 55 F. 2d 696, 902, aff'd 60 F. 2d 1, 2 (10th Cir., 1932); *United States v. Hayes*, 20 F. 2d 873, 889-890 (8th Cir., 1927), cert. den. 275 U. S. 555; *United States v. Heinrich*, 12 F. 2d 938, 939 (D. Mont., 1926). While as pointed out in *United States v. Oregon*, 295 U. S. 1, 27-28 (1935), the construction of federal grants is initially a federal question, the federal courts traditionally defer to state rules of construction.

at high water only 10 weeks out of each year and, when at low water, a navigable depth is reached 450 feet from the high-water mark. See n. 4, *supra*. The lower court's failure to address this issue merits review.

C. The Lower Court's Decision Validating the Tribes' Shoreline Ordinance Is in Conflict with the Restrictions Placed on Indian Civil Regulatory Authority by Montana v. United States and Other Recent Decisions.

The lower court's holding that the Shoreline Protection Ordinance was valid under the criteria applied by this Court to a tribal cigarette tax in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980), and under the criteria applied to tribal restrictions on hunting and fishing on non-member fee lands set down in *Montana v. United States* is clearly in error.

The lower court's decision on the regulatory issue was premised upon three grounds: First, pursuant to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 135, 153 (1980), the exercise of tribal authority in this case, which took its form in the Shoreline Ordinance, was not "inconsistent with the overriding interests of the National Government." 665 F. 2d at 963, App. A at 30. Secondly, even under the rule laid down in *Montana v. United States*, this Court approved regulation of non-Indian activities (1) when it took place on Indian lands or (2) where it "has the potential for significantly affecting the economy, welfare, and health of the Tribes." 665 F. 2d at 964, App. A at 32. The Tribes' ordinance, in the opinion of the lower court, satisfied both of the latter two requirements, for in this case, the Tribes did own the south half of the lake, and because of this ownership, unregulated conduct will "increase water pol-

lution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake," one of "the most important tribal resources." *Ibid.*

Although the lower court perceived a conflict in this Court's decision on Indian regulatory authority expressed in *Colville, supra,* as opposed to that expressed in the *Oliphant* and *Wheeler*[28] rationale adopted in *Montana v. United States* (665 F. 2d at 963), thus inviting this Court's clarification, it is patent that upon careful analysis, there exists no conflict. Additionally, it is clear that the Tribes Shoreline Ordinance would fail to pass muster under either the *Colville* or the *Oliphant* line of cases.

The lower court erroneously held that under *Colville,* Indian tribes could exercise regulatory authority over non-Indians anytime that exercise did not conflict with "overriding federal interests." 665 F. 2d at 963, App. A at 30. Obviously, this interpretation is dangerously overbroad and illustrates a fundamental lack of understanding of what *Colville* actually decided.

Colville centered upon the power of an Indian tribe to tax sales of cigarettes on "Indian lands." This limited taxing authority was only approved because it (1) took place on Indians lands (2) where the Tribes had a "significant interest in the subject matter" and (3) in a situation which would not be "inconsistent with the overriding interests of the National Government, as when (they) seek * * * to prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights." 447 U. S. at 153, 154, citing *Oliphant* and *Wheeler.*

Applying here the first requirement, i.e., that the activity sought to be regulated occur on Indian lands, if

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[28] *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191 (1978); *United States v. Wheeler,* 435 U. S. 313 (1978).

the south half of the lake is not owned by the Tribes,[29] that requirement is not met. Under *Montana v. United States*, this would also have been the determining factor. 450 U. S. at 557, 558.

Thus, here, just as in *Montana v. United States*, "a substantial part of (the Tribes') claim of power to control" riparian rights depends upon their alleged ownership of the bed of the south half of Flathead Lake. 450 U. S. at 550, 557-561. It is self-evident that without that ownership, they can neither satisfy the remaining *Colville* requirements, nor can they come within the limited exceptions noted in *Montana v. United States*, 450 U. S. 565-566. Without ownership, the Tribes have failed to prove any significant interest in regulating dockage and wharfage rights, and certainly regulation of those rights would collide with rights which non-Indians have the right to protect under the Bill of Rights. *Cf. Colville, supra*, 447 U. S. at 153-154. Petitioners have not entered into any "consensual relationship" with the Tribes, and the Tribes consciously rejected at least three opportunities to prove that unregulated shoreline had some direct effect "on the political integrity, the economic security, or the health and welfare of the" Tribes.[30] *Montana v. United States*, 450 U. S. at 565, 566.

Moreover, under *Colville*, regulation would appear to collide with overriding federal interests. Here, the federal government has an interest in seeing that nonmember rights are protected by the Bill of Rights. The ordinance was enacted by a government in which non-

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[29]For that matter, if Petitioners own to low-water mark (See Part B, *supra*.), it would seem that lack of tribal ownership would prevent application of tribal authority.

[30]Mem. Op. at 6-8, App. B at 42-44. The Tribes did not appeal dismissal of those counts of their complaint which raised these precise issues.

members do not participate. It is enforced and administered by a government in which the non-member has no vote and from whose decisions there is no appeal. See Part D, *infra;* App. N. *Cf., Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. 209, 210.

The "National Government" also has an "overriding" interest to see that the "justifiable expectations" of non-members who are enticed onto the reservation by a federal "sales pitch" are not frustrated. *Rosebud Sioux Tribe v. Kneip,* 430 U. S. 584, 604, 605; see also App. M. Here, the non-member has exercised his riparian rights without challenge for over 50 years. *Namen I, supra,* 380 F. Supp. at 466; App. D at 200. While the lake and docks and wharves have been comprehensively regulated by the State, this is the first instance the Tribes have attempted to exert any authority over riparian rights. Mem. Op. 39-44, App. B at 84-86. *Cf. Montana v. United States,* 450 U. S. at 566-567; see also App. O.

Even if the lakebed is owned by the Tribes, still, the lower court was in error in failing to recognize that the non-member riparian rights were federally created concomitant with the extensive dilution of exclusivity effected by the Allotment Act of 1904. 33 Stat. 302, App. I.

The Tribes have never exercised "exclusive use of the south half of Flathead Lake. Treaty of the Upper Missouri, *supra,* Articles 7 and 8, App. G. Cf. *Montana v. United States,* 450 U. S. at 559. As was pointed out by the trial court in *Namen I,* even assuming that title to the south half of the lake was held in trust for the Tribes; nevertheless, Congress had "the power to grant title or rights in the bed and banks of the lake" and, "barring congressional action," could "never secure legal ownership as a state does." 380 F. Supp. at 480.

Puyallup III, construed by this Court in *Montana v. United States*, "indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U. S. at 561. The allotment policy which was fastened upon the Tribes in 1904 did not suggest that non-Indian settlers would be subject to "tribal regulatory authority." 450 U. S. 559, n. 9. It is hardly "likely that Congress could have imagined that peaceful assimilation could be advanced if fee holders" to riparian lands, who purchased land at public auction pursuant to a "sales pitch" authored by the federal government, would then be subject to Indian control. *Id.*

It is clear that regulation of federally created riparian rights owned by non-members on lands either no longer owned by the Tribes or, at the very least, upon lands in which non-members have significant property interests "bears no clear relationship to tribal self-government or internal relations." *Montana v. United States*, 450 U. S. at 564, and n. 13. The Shoreline Ordinance is inconsistent with the diminished authority enjoyed by Indian tribes, particularly when that authority is sought to be exercised over non-member property rights and activities. *Ibid*, 450 U. S. at 565.

This case is another attempt by an Indian tribe to exercise non-congressionally sanctioned regulatory authority over nonmembers occupying fee lands and exercising rights created by express congressional action. It is just this type of exercise of authority which has been withheld by this Court. *Montana v. United States, supra*, 450 U. S. at 564-565; *United States v. Wheeler*, 435 U. S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978). This Court has unanimously agreed that "exercise of tri-

bal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation." *Montana v. United States, supra,* 450 U. S. at 564. Cf. *Merrion v. Jicarilla Apache Tribe,* — U. S. —, 71 L. Ed. 2d 21 at 51 (1982), J. Stevens dissenting. Yet in this case, despite the most recent admonitions of this Court, that is precisely what the lower court has held—a holding which is totally inconsistent with this Court's prior rulings and which surely merits review.

D. The Tribes' Ordinance 64-A (Revised) Violates the Equal Protection and Due Process Guarantees of the Fifth Amendment.

The Shoreline Protection Ordinance purports to regulate riparian rights exercised by all persons including local and state governmental units and agencies. However, it excludes the "Tribes or any person acting as the Tribes' agent."[31] App. N at 273. The ordinance is clearly an attempt by the Tribes to exercise police power over non-members and their property. See Sections 3, 4, 5, 6, 7, and 11, which characterize various activities as "unlawful" and subjects the person in breach of the ordinance to a fine for non-compliance. App. N at 274, et seq. Final decisions are relegated either to the tribal court or to the tribal council, from which no appeal may be taken. Non-Indians did not and do not participate in the Tribes' legislative council, nor are they permitted to be members of the tribal court or council.[32] This ordinance was approved by the

[31]Ordinarily, such a facially discriminatory act would be suspect and subjected to the strictest scrutiny. *University of California Regents v. Bakke,* 438 U. S. 265, 290 (1978).

[32]Traditionally, a voter's disenfranchisement has been grounds to invoke "due process and equal protection." *Kramer*

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Department of Interior and enforcement sought by the United States in this action.

In *Burton v. Wilmington Parking Authority*, 363 U. S. 715 (1961), this Court struck down racially discriminatory policies of a "purely private" party, where it found substantial state involvement. In so doing, the Court noted:

> "• • • The State has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination."

This language is uniquely apropos to the actions of the United States Government in the instant case.

In *Holt Civic Club v. Tuscaloosa*, 439 U. S. 60 (1978), this Court made it clear that without personal involvement in the legislating government, ordinances under attack could survive a constitutional challenge only if the person attacking the statutes did not reside within city boundaries and only when the jurisdiction exercised was quite limited. Neither of these two factors apply to this case, since it is precisely because the non-Indian resides within the reservation that the Tribes seek to exert authority over him. Moreover, where the claim of governmental power is analogous to exercise of zoning or taxing authority, such claim would fail to pass constitutional muster. *Holt Civic Club, supra.* 439 U. S. at 72, n. 8. Finally, it creates a confrontation between a true sovereign, the State of Montana, and a "dependent ward of the federal government." Among the state facilities riparian to Flathead Lake over which the Tribes seek to exercise authority is the Yellow

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v. *Union Free School District*, 394 U. S. 621 (1969); *Cipriano v. City of Huoma*, 395 U. S. 701 (1969); *Hoenix v. Kolodziejski*, 399 U. S. 204 (1970); *Dunn v. Blumstein*, 405 U. S. 330 (1972); and *cf. Reynolds v. Sims*, 377 U. S. 533, 577 (1964).

Bay Biological Station, created by the Act of March 3, 1905, 33 Stat. 1081 (lands granted to the University of Montana). Under Section 14 of the Enabling Act of 1889, 25 Stat. 676, this university would be under "exclusive control of the State of Montana."

The lower court, in a footnote, rejected Petitioners' claims of constitutional infringement (665 F. 2d at 964, n. 31; App. A at 33), relying upon *Talton v. Mayes*, 163 U. S. 376 (1896), *Groundhog v. Keehr*, 442 F. 2d 674, 678 (10th Cir., 1971); and *Martinez v. Southern Ute Tribe*, 249 F. 2d 915, 919 (10th Cir., 1957), cert. den. 356 U. S. 960 (1958).[33] Although this Court has stated that tribal rights of *self*-government are immune to Fourteenth or Fifth Amendment challenges (*Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 (1978)), it has also held that it has a duty to protect basic "personal" rights and "liberties" of all its citizens. *Oliphant, supra*, 435 U. S. at 210. Cf. *Colville, supra*, 447 U. S. at 153-154. Here, a non-tribal member is exposed to fines and, presumably, other sanctions by a jurisdiction "separated by race (and) tradition" seeking to impose "an external and unknown code" which "judges them by a standard made by others and not for them." *Ex Parte Crow Dog*, 109 U. S. 556, 571; *Oliphant, supra*, 435 U. S. 210, 211. In *Oliphant*, it was just such considerations which led the Court to say that they "speak

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[33]Each of the cases involved instances of tribal *self*-government, *i. e.*, members of the Indian community were seeking protection under the Fifth Amendment. Therefore, since only "internal" tribal management dependent upon powers of inherent sovereignty, which survived the Indians' "dependent" status, was challenged, it escaped constitutional attack. However, in this instance, the constitutional tension is created where the reach of Indian authority is most attenuated—their relations with "non-members of the tribe" (*United States v. Wheeler*, 435 U. S. 313, 326 (1978)), who have always had the protective cloak of the Bill of Rights to warm them. *Colville, supra*, 447 U. S. 153, 154.

equally strongly against the validity of respondent's" criminal jurisdiction over non-Indians. *Id.*

In *Colville, supra,* and *Merrion v. Jicarilla Apache Tribe, supra,* the non-member could refuse to buy cigarettes or to exploit Indian-owned resources. Non-member riparian owners, however, can avoid tribal authority only by moving out of the reservation or refusing to exercise the rights conveyed to them by the federal government. It is this type of regulatory authority which creates constitutional tension and which, therefore, must be declared invalid.

This case is a proper one, we suggest, for this Court to review the claims of Indian tribes to sovereign power over non-members owning fee lands within Indian reservations by explicitly confining tribal powers to tribal *self*-government.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 30th day of June, 1982.

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